BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KENDRA LEE HELFRICH	)	
Claimant	)	
	)	
VS.	)	
	)	
FLYING J, INC.	)	
Respondent	)	Docket No. 1,033,975
	)	
AND	)	
	)	
ZURICH AMERICAN INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the April 9, 2009 preliminary hearing Order entered by Administrative Law Judge Pamela J. Fuller (ALJ).

ISSUES

The ALJ granted claimant's request for the medical treatment to her right knee as recommended by Dr. Michael Baughman, the court ordered independent medical examiner. Although the ALJ provided no analysis for her ruling, in granting claimant's request, she implicitly concluded claimant sustained a compensable injury.

Respondent appealed this decision alleging the ALJ erred. Respondent contends claimant's need for medical treatment is, more probably true than not, due to an injury she received performing an activity of daily living. Respondent alternatively argues that claimant has sustained an intervening accident that relieves any responsibility it may have had to provide medical treatment in this matter. In response, claimant contends the ALJ's Order should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Undersigned Board Member makes the following findings of fact and conclusions of law:

There is no dispute that claimant presently requires medical treatment to her right knee. She had no previous problems with this knee and it is undisputed that her symptoms began on March 11, 2007 and that she promptly notified her supervisor of her physical complaints on March 12, 2007. Claimant has been diagnosed with a probable meniscal tear and orthoscopic surgery has been recommended. The mechanism of her alleged injury is at the heart of this dispute.

Claimant was hired as a dishwasher to work 12-13 hours per day. In the course of her shift she would have to move, bend, twist and lift carts of dishes. On March 11, 2007, claimant bent down to lift a cart and after about 10-15 minutes she noticed pain in her right knee. She worked the rest of her shift, and the next morning her knee was swollen and discolored. Claimant went to work and notified her supervisor, Shane, who told her to go to the ER or see her own physician.

Claimant first saw Dr. Roger C. Trotter who thought she had a strained knee. When her symptoms continued she sought treatment from the emergency room. An MRI was ordered, but respondent did not readily provide it. These initial records do not reflect a clear mechanism of injury but point to March 11, 2007 as the date of the onset of symptoms. There is a recorded statement within the record where claimant says that she was standing watching co-workers unclog a dishwasher when she noticed her right knee complaints.

She was seen (at her lawyer's request) by Dr. Murati on November 6, 2007 who noted her mechanism of injury was bending, twisting and lifting dishes. Dr. Murati also recommended an MRI. Respondent referred claimant to Dr. Alok Shah who also noted the onset of her complaints as March 11, 2007 and concurred with Dr. Murati's recommendations. Both Dr. Shah and Dr. Murati attributed claimant's right knee problems to her work at Flying J, although Dr. Murati also opined that claimant had gone on to other employment and aggravated her knee and injured her back working as a housekeeper.

The ALJ then appointed Dr. Baughman to conduct an independent medical examination. Dr. Baughman had the benefit of his own examination as well as the medical records from all of the earlier medical providers. Dr. Baughman's records do not reflect a mechanism of injury but nonetheless, he attributes claimant's knee problems to her work for respondent. He ultimately concluded the following:

> In the absence of a documented pre-existing condition in the same knee requiring Ms. Helfrich to see a Doctor of Medicine, one must take in good faith that

> this injured worker sustained her injury on the 11th of March 2007 as a result of work related activities.[1]

He went on to state that claimant requires a right knee arthroscopy for the purposes of diagnosis, treatment and resolution of her claim. When asked if her subsequent work activities for another employer gave rise to claimant's need for care, he stated that he had -

> . . . no opinion about her alleged injury at Trinity Nursing Home. The only documentation of this that I am aware of is in Dr. Murati's Independent Medical Evaluation relating to Ms. Helfrich's low back. Ms. Helfrich has no complaint of back pain in my Independent Medical Evaluation, and all of her current concerns would be referable to her March 11, 2007 work related injury.[2]

The ALJ granted claimant's request for the treatment outlined by Dr. Baughman and in doing so, she implicitly concluded that claimant established that she sustained an accidental injury arising out of and in the course of her employment with respondent on March 11, 2007.

Respondent contends the evidence and the law do not support the ALJ's Order. Respondent first contends that claimant offered a number of different explanations for the onset of her injury. Respondent argues that the greater weight of the evidence supports its contention that claimant's true mechanism of injury, that of standing and watching her co-workers unclog the dishwasher is nothing more than an activity of day to day living and is not, under the Kansas Workers Compensation Act (Act) compensable. This defense comes from the definitions of "personal injury" and "injury" contained within the Act. After defining what those two terms mean, the statute goes on to *exclude* certain items from that definition. K.S.A. 44-508(e) provides as follows:

> An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

The Board has concluded that the exclusion of normal activities of day-to-day living from the definition of injury was an intent by the Legislature to codify and strengthen the holdings in *Martin*[3] and *Boeckmann.*[4] Moreover, the Court in *Boeckmann* distinguished cases in which "the injury was shown to be sufficiently related to a particular strain or

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[1] Dr. Baughman's IME Report dated February 19, 2009 at 6.

[2] *Id.*

[3] *Martin v. U.S.D. No. 233*, 5 Kan. App. 2d 298, 615 P.2d 168 (1980).

[4] *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, 504 P.2d 625 (1972).

episode of physical exertion" to support a finding of compensability.[5] This Board member concludes that the Legislature did not intend for the "normal activities of day-to-day living" to be so broadly defined as to include injuries caused or aggravated by the strain or physical exertion of work. To hold otherwise would mean the exception swallows the rule.

Here, this Board member is not persuaded that claimant's testimony is all that inconsistent. It is uncontroverted that her job involved bending, lifting and twisting of carts of dishes a number of times over the course of her shift. She felt the pain upon twisting and lifting, but only 10-15 minutes later while she was watching the co-workers unclog the dishwasher did she begin to feel the pain increase and spread. The pain was fully manifested the next morning when her knee was swollen and discolored. She then informed her employer of the problem. This would also explain claimant's declaration that she had no "injury" when questioned by the medical providers. The injury to her body was rather insignificant and only after the passage of time did the damage become more noticeable. Thus, this Board Member believes claimant's testimony as to the mechanism of her injury is not inconsistent.

And as for respondent's defense that this injury is the result of a day-to-day living activity[6], this Board Member finds that claimant's accident does not fall within that exception. The number of dishes and the weight of those dishes alone takes this scenario outside the normal course of day-to-day living. Claimant lives alone with a cat and no doubt does not process and clean the number of dishes she was expected to lift, load, wash and unload while working for respondent. For these reasons, this Board member finds the ALJ's implicit conclusion that claimant sustained an accidental injury arising out of and in the course of her employment with respondent is affirmed. This accident is not excluded by the day-to-day living exception in K.S.A. 44-508(e).

Finally, respondent urges the Board to reverse the ALJ's Order because it contends, based upon Dr. Murati's written report, that claimant has gone on to injure her back and permanently aggravate her knee, as a result of her housekeeping duties with a subsequent employer. And as a result of that subsequent, intervening accident, respondent has no further liability.

While it is true that Dr. Murati has made such an assertion, the nature of that injury appears to have been to claimant's back. Dr. Baughman denied that claimant has complained about any subsequent injury to her back during the course of his examination. Claimant did not testify about any subsequent accident or injury to her back and thus, it is

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[5] *Id.* at 737.

[6] *Johnson v. Johnson County*, 36 Kan. App. 2d 786, 147 P.3d 1091, *rev. denied* 281 Kan. ____ (2006).

difficult to ascertain the basis for Dr. Murati's opinion. In any event, it is clear from the ALJ's Order that she relied upon the opinions expressed by Dr. Baughman. After considering the entire record, this member of the Board finds the ALJ's reliance to be justified and reasonable. The ALJ's Order is, therefore, affirmed in all respects.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.[7] Moreover, this review on a preliminary hearing Order may be determined by only one Board member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Pamela J. Fuller dated April 9, 2009, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June 2009.

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JULIE A.N. SAMPLE
BOARD MEMBER

c: D. Shane Bangerter, Attorney for Claimant
Matthew J. Schaefer, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge

[7] K.S.A. 44-534a.